SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000826-001 DT 05/26/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA DIANA C HINZ

v.

RALPH E NOVALLA (001) ROBERT W DOYLE

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC
FINANCIAL SERVICES-CCC

RECORD APPEAL RULE / REMAND

PHOENIX CITY COURT

Cit. No. #20029022500-01

Charge: 1) DUI-LIQUOR/DRUGS/VAPORS/COMBO
2) DUI W/BAC OF .08 OR MORE
3) EXTREME DUI-BAC .15 OR MORE

DOB: 06/12/64

DOC: 05/18/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16 and A.R.S. Sections 12-124 (A) and 13-4032.

This matter has been under advisement since May 19, 2004. The Court has considered and reviewed the record of the proceedings from the Phoenix City Court, the exhibits made of record and the memoranda submitted.

FACTS AND CASE HISTORY

Appellee, Ralph Novalla, was involved in an automobile accident on May 18, 2002 and charged with violating A.R.S. 28-1381(A)(1) (driving under the influence of intoxicating liquor) and 28-1381(A)(2) (driving with an alcohol concentration of .15 or higher within two hours of driving).

On May 13, 2003, Novalla filed a motion to suppress the blood results arguing that the seizure of his blood was unlawfully obtained. After argument, the Judge granted Novalla's motion to suppress at which time the State moved to dismiss to file an appeal. This is that appeal.

STANDARD OF REVIEW

The standard of review in cases involving mixed questions of law and fact are reviewed *de novo*.[1] The trial court's finding of fact underlying the decision to suppress the evidence are accepted unless clearly erroneous.[2] An appellate court is not bound, however, by the trial court's conclusions of law nor findings that combine both fact and law when there is error as to the law.[3]

DISCUSSION

The issue raised is whether the blood was drawn for medical purposes in accordance with A.R.S. 28-1388 (E) and whether exigent circumstances existed for seizure without a warrant. The State must satisfy both requirements for admissibility at trial. In the trial court, Novalla argued that the blood results should be suppressed because the blood was not drawn for medical purposes and that a warrantless search was not appropriate because exigent circumstances did not exist.

Both Novalla and the State rely on State v. Cocio.[4] In *Cocio*, the Arizona Supreme Court held that a warrantless removal of blood from a person is permitted if there is probable cause to believe that a person has violated A.R.S. 28-1381(A)(1) or 28-1381(A)(2); exigent circumstances are present; and the blood is drawn for medical purposes by medical personnel.

[1] State v. Buccini, 167 Ariz. 550, 810 P.2d 178 (1991).
[2] United States v. Elliott, 893 F.2d 220 (9th Cir. 1990).
[3] Park Central Development Co. v. Roberts Dry Goods, *Inc.* 11 Ariz. App.58, 461 P.2d 702 (1969).
[4] 147 Ariz. 277, 709 P.2d 1336 (1985).

At the trial court, Novalla conceded that the officer had probable cause for the blood draw. The facts in *Cocio* are similar to the facts here. In *Cocio*, following an accident the defendant was taken to the hospital for treatment. Pursuant to the doctor's orders blood was drawn, a sample of which was provided to law enforcement. At the time the sample was taken the defendant was not under arrest and no search warrant had been obtained.

In the case at hand, Novalla was involved in automobile accident and was transported to the hospital for treatment. Shortly thereafter, the officer observed a nurse drawing blood from the defendant. At the time the blood was drawn, Novalla was not under arrest and no search warrant had been obtained. Novalla first argues that exigent circumstances did not exist and therefore that a warrant was required to obtain a blood sample. This argument is contrary to the reasoning in *Cocio.* Because of the destructibility of the evidence, exigent circumstances existed. The highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time.[5]

The *Cocio* court found exigent circumstances involving alcohol more compelling than the facts of Cupp v. Murphy[6], that involved a warrantless search of a suspect who voluntarily presented himself to law enforcement for questioning in connection with his wife's murder. While being questioned, law enforcement noticed a dark spot on the suspect's finger and suspected it was dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked the suspect if they could take a sample of scrapings from his fingernails. He refused and the police proceeded to take the samples without a warrant. The United States Supreme Court held, that in the case of a station-house detention based upon probable cause, the very limited intrusion undertaken to preserve highly evanescent evidence was not violative of the Fourth and Fourteenth Amendments.

Cupp, as in this case, involved the taking of evidence from a person prior to arrest and without law enforcement first attempting to obtain a search warrant. The Arizona Court of Appeals has, on two different occasions, upheld the *Cocio* decision that exigent circumstances exist when blood is drawn pursuant to the medical purposes exception statute in DUI cases because of the destructibility of evidence.[7]

Novalla next argued that the blood drawn was not for medical purposes as required by Arizona law. Novalla argues that his medical records demonstrate that he was treated for back and neck pain and although they show the blood draw and test, they clearly show the blood draw served no medical purpose. At the trial court, a second issue was raised by the court. The court was concerned that no testimony was offered establishing the qualifications of the person

[5] Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 17 L.Ed.2d 908 (1966).
[6] 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed2d 900 (1973).
[7] Lind v. Superior Court, 191 Ariz. 233, 954 P.2d 1058 (App. 1998); State v. Howard, 163 Ariz. 47, 785 P.2d 1235 (App. 1989).

drawing the blood. Both issues present similar questions and should be resolved in the same way. Novalla offered no witnesses at the hearing on the motion to suppress, relying only on the state's failure to call witnesses to demonstrate a medical purpose. Novalla's argument is misplaced.

In this case, Novalla's medical records demonstrate that a physician ordered the blood draw. A nurse in the emergency room of St. Joseph's hospital performed the blood draw. It is well established that when blood is drawn by medical personnel in a hospital setting there is a presumption that the person drawing the blood is qualified to do so.[8]

Similarly it stands to reason that if blood is ordered drawn in a hospital setting by a treating physician, that it is drawn for medical purposes. Just as the trial court in *Nihiser* concluded, "...the blood was drawn at a hospital [and] there's a presumption that hospitals are not in the business of allowing unqualified persons to draw blood,"[9] it is reasonable to conclude that hospitals are not in the business of ordering tests that do not possess medical purposes.

As in *Nihiser*, once the state establishes a prima facie case for the admission of evidence, predicated on a reasonable presumption of validity, the law places the burden of challenging said evidence on the defendant.[10] At trial, Novalla had the opportunity to present evidence challenging the qualifications of the person drawing the blood and the medical purpose for drawing the blood. By failing to present evidence challenging the medical purpose of the blood draw or the qualifications of the nurse who drew the blood, Norvalla failed to rebut the presumptions that a qualified person drew the blood and that the blood was drawn for medical purposes.

For these reasons,

IT IS ORDERED, reversing and vacating the Phoenix City Court's decision to suppress the blood.

IT IS ORDERED, remanding this case back to the Phoenix City Court for actions consistent with this ruling which may include refiling of the charges in this case.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

[8] State v. Nihiser, 191 Ariz. 199, 203, 953 P.2d 1252, 1256 (App.) 1997).
[9] Id. at 203, 953 P.2d at 1256.
[10] State v. Hyde, 186 Ariz. 252, 921 P.2d 655 (1995).